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Before the  
**Federal Communications Commission**  
 Washington, DC

SEP 17 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of	)	MM Docket No. 93-107
	)	
DAVID A. RINGER	)	File No. BPH-911230MA
	)	
ASF BROADCASTING CORP.	)	File No. BPH-911230MB
	)	
WILBURN INDUSTRIES, INC.	)	File No. BPH-911230MC
	)	
SHELLEE F. DAVIS	)	File No. BPH-911231MA
	)	
OHIO RADIO ASSOCIATES	)	File No. BPH-911231MC

For Construction Permit for an  
 FM Station on Channel 280A in  
 Westerville, OH

To: Administrative Law Judge  
 Walter C. Miller

**REPLY TO OPPOSITION TO MOTION TO ENLARGE THE ISSUES  
AGAINST ASF BROADCASTING, INC.**

Shellee F. Davis ("Davis"), by her attorney, hereby submits her Reply to the "Opposition to Motion to Enlarge Issues" filed by ASF Broadcasting Corp. ("ASF") in this proceeding.<sup>1</sup> With respect thereto, the following is stated:

As Davis established in her Motion against ASF, ASF's proposed budget for the construction and initial operation of its proposed station states that ASF will need \$90,000 to construct and operate its station for three months. The budgetary figure contained in its application has never been amended. Nevertheless, it was learned during discovery that ASF's principal utterly failed to include within that budget at any time cost estimates for two crucial

<sup>1</sup> Ringer filed his Opposition on September 7, 1993. This Reply is being filed five days after the opposition was filed (as computed under Section 1.4 of the Commission's Rules), as permitted under Section 1.294(c). This Reply therefore is timely filed.

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aspects of ASF's proposal -- auxiliary power equipment and a directional antenna. The estimated cost for those two items alone would inflate ASF's budget by an estimated \$43,450, which is exactly \$43,450 greater than the cost estimates contained in her unamended application. Similarly, Davis established that the "leasing letter" on which ASF (as well as others) are relying does not in any way commit Mid-Ohio to lease any equipment, but only that it will lease "some or all" of the equipment contained on an attached list -- nevertheless, ASF did not budget funds to purchase or lease any or all of the equipment that may not be made available to it in the future. Finally, Davis established that the level of funding that ASF claimed was available for the construction and operation of its proposed station is not the level contained in documents provided in discovery. Therefore, the deficiencies discovered necessitate a conclusion that based upon the proposal as it has existed previously (and for which leave to amend has never been sought or accepted), ASF was without sufficient committed funds to construct and initially operate its proposed station.

In its opposition, ASF attempts to create a moving target, whereby it essentially is amending its financial pre-existing financial proposal, without first seeking leave to amend. Significantly, ASF does not dispute that the budgetary figure contained in its application states that ASF believes that it will cost \$90,000 to construct and operate its station, and that figure has never been amended. ASF further does not dispute Davis' estimate that the directional antenna and auxiliary power supply it has proposed in its application will cost approximately \$43,450, and that Ms. Frizzell did not prepare a balance sheet for herself (as required under the instructions contained in the FCC Form 301) prior to executing ASF's application.

Despite these concessions, ASF continues to erroneously claim that it adequately

established that it was financially qualified prior to the time it filed its application. First, ASF argues that it has available to it "\$196,000" for the construction and operation of its station, adding together \$750 (the amount contributed by Mr. Beauvais for capital stock), \$5250 (the amount contributed by Mr. Beauvais for additional paid in capital), \$30,000 (the amount to be paid by Mr. Beauvais for further paid-in capital), \$60,000 (further paid-in capital by Mr. Beauvais), and \$100,000 (funds to be provided by Mr. Beauvais as a loan).

As ASF correctly points out, those figures undeniably add up to \$196,000. But what ASF fails to note is that its own stockholder agreement limits the purposes for which a large portion of those funds could be used. Use of the "\$750", "\$5250", "\$30,000", and "\$60,000" provided by Mr. Beauvais is limited as follows:

Legal, engineering, or other reasonable expenses related to the Company's application to the Federal Communications Commission for the issuance of a license to operate an FM radio service to serve Westerville, Ohio.

Attachment 1 at 3. In other words, those sums are for use for the pre-grant, pre-construction expenses to be incurred by ASF. In contrast, according to ASF's Stockholder Agreement, the only sum allocated for the construction and operation of the proposed station is the "\$100,000" loan to be provided by Mr. Beauvais. As the Agreement specifically states:

The loan proceeds shall be used for the following purposes only:

(a) Lease costs necessary for leasing of the Company's radio broadcast facility in or near Westerville after issuance of the Federal Communications Commission of a construction permit to the Company for FM radio service licenses to Westerville, Ohio on Channel 280.

(b) Three (3) months additional working capital as required by the Federal Communications Commission license application.

Attachment 1 at 4. The FCC requires that applicants' financial assurances be in writing, and that leave to amend those assurances must timely be sought if and when the nature or level of such assurances change. It also is well established that an applicant is not free to ignore the express conditions or limitations contained in its financing documents. Intermart Broadcasting Gulf Coast, Inc., 8 FCC Rcd 2937, 2939 ¶ 11 (Rev. Bd. 1993). The Stockholder Agreement is the only document provided by ASF to establish its financial qualifications, and no petition seeking leave to amend its financial assurances has been filed by ASF at any time. Thus, as Davis stated previously, the written documentation on which ASF is relying to establish its financial qualifications provides assurances for only \$100,000 for the construction and operation of its station. Therefore, ASF has not had assurances of sufficient funds to satisfy the elements of its proposal since at least March 5, 1992, the date on which ASF amended its application to include a proposal to utilize a directional antenna and for auxiliary power. ASF's attempt to bolster its financial proposal by including a recent declaration from Thomas Beauvais (whereby he attempts to amend the Stockholder's Agreement to grant ASF permission to use additional portions of his funds for the purchase of a directional antenna and/or auxiliary power units) cannot be credited. The declaration constitutes a post-"B"-date amendment to ASF's financial qualifications, for which no "good cause" or leave for acceptance has ever been timely sought.

Moreover, insofar as ASF's budget never has included sufficient funds to obtain or confidently obtain other equipment for its station -- specifically, the equipment dealt with in the Mid-Ohio letter -- ASF has never been financially qualified to construct and operate its proposed station. The only argument ASF extends to attempt to rebut this proposition is its claim that there is no "documentation" that proves any of the items will not be available, and

that the "highest and best" use for the equipment is to lease it to the successful applicant in this proceeding.

As to the first argument, the author of the Mid-Ohio letter has been contacted, and as seen in Attachment 2, Mr. Fry confirms that Mid-Ohio has no provided no assurances of necessarily leasing all of the equipment to any applicant. As Mr. Fry, Mid-Ohio's Authorized Agent states in his Declaration issued under penalty or perjury, while valid assurances have been provided by Mid-Ohio for lease of the Mid-Ohio tower, transmitter builder and studio, the same cannot be said for the tangible personal property owned by Mid-Ohio:

In regard to the personal property, Mid-Ohio provided no assurance concerning what itemized equipment in the inventory accompanying the correspondence would be available to the successful applicant.

Attachment 2 (emphasis added).<sup>2</sup>

As to ASF's second argument, as Mid-Ohio original letter states, \$6000/month will be charged by Mid-Ohio for the lease of tower, transmitter building, and studio facilities, regardless of the nature or amount of equipment that will be leased -- failure, however, by Mid-

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<sup>2</sup> A standard "turn-key" equipment lease is attached hereto as Attachment 3. As seen, in a standard equipment lease, a leasing company commits to provide certain specific equipment in return for certain compensation. In such a standard arrangement, a lessor is not left to "guess" "which if any" or whether "some or all" of the equipment will, in fact, be made available. By the plain terms of the Mid-Ohio letter, the Mid-Ohio letter provides far less than the assurances contained in a typical leasing arrangement -- while Mid-Ohio agrees to lease "equipment," instead of stating which equipment it is willing to lease, the letter states:

The equipment would include some or perhaps all of the equipment itemized in the inventory accompanying this inventory. Failure to lease all of the equipment listed in the inventory will not result in a reduced lease package price.

Attachment 3.

Ohio to also lease all of the equipment "will not result in a reduced lease package price." This is confirmed in Mr. Fry's latest Declaration:

Regardless of what equipment is available, the lease package price would not be reduced from six thousand dollars (\$6000) per month.

Attachment 2. Thus, Mid-Ohio earns its \$6000/month regardless of any additional sums Mid-Ohio would acquire through piecemeal sale of the equipment. Therefore, the "highest and best" use of the equipment, for better or for worse, is for Mid-Ohio to sell as much of the equipment as possible prior to entering into a lease with any of the parties in this proceeding.

Thus, the facts are as Davis has known all along -- namely, that while it is possible that the Mid-Ohio equipment will be made available by lease to ASF or another successful applicant at such time as the construction permit in this proceeding is awarded, no assurances of that availability yet exist.<sup>3</sup> Instead of including funds in its budget sufficient to accommodate the unavailability of all of the equipment for the operation of the station, ASF wrongly has proceeded under the erroneous assumption that "all" equipment has been pledged to it (or any other successful applicant), and consequently, that no additional funds for the purchase or lease of funds need to be budgeted by ASF to ensure its ability to successfully construct and operate its proposed station. It is well established, however, that an applicant is not free to ignore the express conditions or limitations imposed on property by an owner. Intermart Broadcasting Gulf Coast, Inc., 8 FCC Rcd 2937, 2939 ¶ 11 (Rev. Bd. 1993), citing,

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<sup>3</sup> In contrast, although Davis is proposing to use the Mid-Ohio equipment, she has prepared a "worst case" budget and has made arrangements for the availability of funds sufficient to purchase, if necessary, new equipment to replace the Mid-Ohio equipment in the event the Mid-Ohio equipment becomes unavailable prior to the execution of a lease between Davis and Mid-Ohio. Davis' budget also provides for a \$50,000+ financial cushion.

South Florida Broadcasting Co., Inc., 57 R.R.2d 495, 500 (Rev. Bd. 1984). As a result, it must be concluded that a prima facie case has been presented indicating that ASF did not possess a "reasonable assurance" of the availability of sufficient funds for the construction and initial operation of its proposed station at the time it filed its application (or thereafter), which also necessitates the addition of the requested issue.

Finally, further establishing the need for a financial issue in this proceeding against ASF is the inconsistent and potentially destructive testimony that has been provided by Ms. Frizzell with respect to ASF's need to budget funds for the purchase or lease of auxiliary power generating equipment and a directional antenna. At her deposition, Ms. Frizzell clearly was unaware of whether emergency power generating equipment or a directional antenna would be needed by ASF. Specifically, she stated:

Q: [W]hat is your understanding concerning whether or not the equipment that was owned by WBBY Mid-Ohio, whether they owned a directional antenna?

A: I don't believe they did.

\* \* \*

Q: Now, you would have to, I suppose, purchase that antenna, is that correct?

A: Yes.

Q: Is there -- has there been an estimate concerning how much such an antenna would cost?

A: No.

Q: Do you have any idea how much such as antenna would cost?

A: No.

\* \* \*

Q: [L]et me place a copy of your cost-or-operations budget before you. Under what entry is it under?

A: It's not on there.

Q: Okay. Is it on any other budgetary estimate that you've made?

A: No.

TR 74-76 (Attachment 4). With respect to emergency power generating equipment:

Q: Did WBBY operate with the capability for auxiliary power, generation equipment?

A: They had a generator, yes.

Q: Okay. Was that at the main studio?

A: Yes, it was.

\* \* \*

Q: And they had such an emergency generating equipment capability at its transmitter site?

A: I don't know.

Q: In light of that, do you know if the equipment that would be included by WBBY or Mid-Ohio, whether it will include an emergency generating capability -- or emergency generator for the transmitter site as part of the equipment it will supply to you?

A: I don't know.

Q: Have you budgeted such a figure -- such an item in your items for construction of operation of the station?

A: No, I have not.

TR 76-77 (Attachment 4). In her recent declaration, Ms. Frizzell significantly changed her story, indicating that a great deal of thought and consideration went into the need to include such equipment at the time of the "B"-cut-off-date amendment," and adding those items to its proposal:

Although I did not, at the time of the amendment, know specifically how much these items would cost, I knew that they,



as with other equipment, could be leased or purchased on terms.

Attachment 5. Cf. Opposition, Attachment 2 (Beauvais agrees for the use of his funds for the "purchase" of a directional antenna and/or auxiliary power units). Not only are no details concerning the terms under which the equipment could be "leased or purchased" disclosed, this statement is inconsistent with her earlier claim that she was not aware that the emergency power generating equipment would even be needed, and that neither item was previously included in a budget for the station (most particularly, the ASF amendment filed with the FCC on March 5, 1992). It appears that Ms. Frizzell is blatantly attempting to exaggerate or misrepresent the nature and extent of her previous consideration of the costs for auxiliary power and/or a directional antenna in an attempt to avoid the designation of a financial issue in this proceeding. This new information presented by ASF also raises questions that would need to be explored in a hearing under the requested issue.

In short, ASF's proposal contains a multiplicity of shortcomings which individually and in the aggregate raise questions concerning the adequacy of ASF's basic financial qualifications. None of the information or arguments raised by ASF in any way eliminate the need for the designation of the requested issue in this proceeding. An applicant must be financially qualified at the time it files its application. Aspen FM, Inc., 6 FCC Rcd 1602, 1603 (1991). No new financial proposal can be accepted absent the submission of a petition for leave to amend pursuant to 47 C.F.R. § 73.3522(b) demonstrating good cause. Texas Communications Limited Partnership, 6 FCC Rcd 3186, 3187 ¶ 9 (1991). As the Mass Media Bureau recently confirmed, an applicant also cannot modify its proposed budget for the construction of its station without prior consent. KR Partners, 8 FCC Rcd 1748, 1949 ¶ 5

(Chief, Audio Services Div. 1993). ASF has not amended the budgetary figure it filed with its with the FCC in its original application. Its proposal simultaneously is confused, inconsistent, and deficient. Accordingly, the additional the requested issues remain warranted.

WHEREFORE, it is respectfully requested that the Motion to Enlarge Issues Against ASF Broadcasting Corporation filed by Shellee F. Davis be granted, and that the issues be enlarged in this proceeding against ASF Broadcasting Corporation, as requested.

Respectfully requested,

SHELLEE F. DAVIS

1250 Connecticut Ave.  
7th Floor  
Washington, DC 20036  
(202) 637-9158

By:

Dan J. Alpert

September 17, 1993

Her Attorney

**ATTACHMENT 1**

## **SHAREHOLDERS AGREEMENT**

**THIS SHAREHOLDERS AGREEMENT** is entered into on December 23, 1991, among the following parties (hereinafter collectively referred to as the "Parties"): **ARDETH S. FRIZZELL** (hereinafter referred to as "ASF") and **THOMAS J. BEAUVAIS** (hereinafter referred to as "TJB").

### **WHEREAS:**

A. ASF and TJB constitute all of the shareholders as **ASF BROADCASTING CORPORATION**, an Ohio Corporation (hereinafter referred to as the "Company"). ASF is the holder of Two Hundred and Fifty (250) shares of Voting Common stock of the Company and TJB is the holder of Seven Hundred and Fifty (750) shares of Non-Voting Common Stock of the Company; and

B. No other shares of stock of the Company have been authorized, issued or are outstanding; and

C. The Company desires and intends to submit an application to the Federal Communications Commission for the issuance of a license to operate an FM radio service to serve Westerville, Ohio; and

D. By this Agreement, the parties intend to establish and set forth further understandings between them concerning future capital contributions and loans by the shareholders to the Company, voting rights, management, and ASF'S option to purchase in accordance with the provisions hereinafter set forth;

**NOW THEREFORE**, it is agreed as follows:

1. **Governing Law.** This Agreement and the Corporation subject to this Agreement shall be governed under and in accordance with Ohio Revised Code Section

1701.591, the Ohio close corporation law. This Agreement shall regulate aspects of the internal affairs of the Corporation among themselves to the extent set forth herein. If the Corporation's Articles of Incorporation or Code of Regulations shall be inconsistent with this Agreement, such inconsistent provisions of the Articles of Incorporation and Code of Regulations shall be suspended during the term of this Agreement and the provisions of this Agreement shall be controlling. To the extent not inconsistent with the provisions of this Agreement, the Articles of Incorporation and Code of Regulations of the Corporation, as amended from time to time, shall regulate aspects of the internal affairs of the Corporation and the relations of the Shareholders of the Corporation among themselves.

2.     Shareholder Management.             The business and affairs of the Corporation shall be managed by the voting Shareholders, and the Corporation shall not have a board of directors. For purposes of any statute or rule of law relating to corporations, the voting Shareholders shall be deemed to be the directors of the Corporation to the extent not inconsistent with this Agreement.

TJB acknowledges and confirms that by his purchase of Non-Voting Common stock in the Company he has no right to vote on any matters affecting the Company which would normally be afforded to stockholders whose stock carries voting rights. By virtue of this non-voting ownership interest, TJB shall have no voice or right to vote upon, direct, manage or otherwise govern any of the affairs of the Company.

3.     Capitalization.             The parties acknowledge that as of the date of issuance of the capital stock to each of them, ASF and TJB have paid the following sums for the purchase of stock:

	<u>Capital Stock</u> <u>\$1.00 Par Value</u>	<u>Additional Paid</u> <u>in Capital</u>
250 Voting Common	\$250.00	\$1,750.00
750 Non-voting Common	\$750.00	\$5,250.00

#### **PRIOR TO GRANT OF CONSTRUCTION PERMIT**

In addition to the Additional Paid In Capital referred to hereinabove, ASF and TJB agree to provide further Additional Paid In Capital in the same proportion as their respective Capital Stock Accounts up to Forty Thousand (\$40,000) Dollars total. In addition to the above, TJB further agrees to provide Additional Paid In Capital up to Sixty Thousand (\$60,000) Dollars. The Additional Paid In Capital, first from ASF and TJB jointly, and after, by TJB, are to be paid to the Company within thirty (30) days after receipt of a request for said Additional Paid In Capital from the President of the Company. The proceeds thereof shall be used for the following purposes only:

Legal, engineering, or other reasonable expenses related to the Company's application to the Federal Communications Commission for the issuance of a license to operate an FM radio service to serve Westerville, Ohio on Channel 280.

#### **AFTER GRANT OF CONSTRUCTION PERMIT**

After issuance of a Construction Permit authorizing the Company to operate an FM radio service for Westerville, Ohio on Channel 280, and upon which no further appeals can be taken, TJB agrees to loan to the Company additional amounts, up to One Hundred Thousand (\$100,000) Dollars, on a first secured basis at an interest rate of prime plus three (3%) percent (prime to be determined by the then current published rate of Bank One of Columbus, N.A.)

with maturity of five (5) to seven (7) years and with interest and principal payment provisions to be determined at the time the loan(s) is (are) closed. The loan proceeds shall be used for the following purposes only:

(a) Lease costs necessary for leasing of the Company's radio broadcast facility in or near Westerville, Ohio after issuance of the Federal Communications Commission of a construction permit to the Company for FM radio service licensed to Westerville, Ohio on Channel 280.

(b) Three (3) month's additional working capital as required by the Federal Communications Commission license application.

4. Option to Purchase. ASF shall have an option to purchase all of TJB's Capital Stock (consisting of Seven Hundred Fifty (750) shares of Non-Voting Common Stock) on the following terms and conditions, provided however, that all outstanding loans from TJB to the Company are paid in full prior to exercise of the option.

(a) Payment. In cash at closing.

(b) Option Time Period. Any time during the first three (3) years after issuance of a Construction Permit authorizing the Company to operate an FM radio service for Westerville, Ohio on Channel 280 and upon which no further appeals can be taken. This option may be exercised by written notice as provided herein.

(c) Option Price. During the first year after issuance of a Construction Permit authorizing the Company to operate an FM radio service for Westerville, Ohio on Channel 280 and upon which no further appeals can be taken, the option price shall be five (5) times to the total of TJB'S Capital Stock and Additional Paid In Capital accounts. During the second year

after issuance of a Construction Permit authorizing the Company to operate an FM radio service for Westerville, Ohio on Channel 280 and upon which no further appeals can be taken, the option price shall be six (6) times the total of TJB'S Capital Stock and Additional Paid In Capital Accounts. During the third year after issuance of a Construction Permit authorizing the Company to operate an FM radio service for Westerville, Ohio on Channel 280 and upon which no further appeals can be taken, the option price shall be seven (7) times the total of TJB'S Capital Stock and Additional Paid In Capital accounts.

5. Modification. This instrument contains the entire Agreement of the Parties with respect to the subject matter contained herein and may be altered, amended or superseded only by an Agreement in writing, signed by the party against whom enforcement of any waiver, change, modification, extension or discharge is sought. No action or course of conduct shall constitute a waiver of any of the terms and conditions of this Agreement, unless such waiver is specified in writing, and then only to the extent so specified. A waiver of any of the terms and conditions of this Agreement on one occasion shall not constitute a waiver of any other terms and conditions of this Agreement, or of such terms and conditions on any other occasion.

6. Notices. Any notices required or permitted to be given under this Agreement shall be sufficient if in writing and if mailed to the party to whom such notice is given at their last known address or at such address as such party may provide in writing from time to time. Any such notice mailed to such address shall be effective when deposited in the United States mail, duly addressed and with postage prepaid. Such notice may, but need not be, by certified mail, return receipt requested. Notice may also be given by overnight delivery service so long as such service maintains written confirmation of delivery.



7. Severability. Each and every covenant and agreement contained in this Agreement is, and shall be construed to be, a separate and independent covenant and agreement. If any term or provision of this Agreement, or the application thereof to any person or circumstances, shall be to any extent invalid and unenforceable, the remainder of this Agreement, or the application of such term or provision to persons or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby.

8. Attorneys' Fees. In the event that any action at law or in equity is required to enforce the provisions of this Agreement, there shall be allowed to the prevailing party, to be included in any judgment recovered, reasonable attorney's fees to be fixed by a court.

9. Governing Law. The validity, interpretation and performance of this Agreement shall be governed and construed by the laws of the State of Ohio.

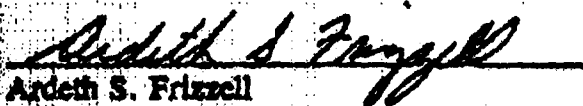
10. Assignment. This Agreement shall be binding upon and shall inure to the benefit of the parties, and their respective heirs, beneficiaries, administrators, executors, successors, and assigns.

11. Endorsement on Stock Certificate. The parties acknowledge that the stock certificates to be issued representing their ownership interest in the Company shall contain an appropriate endorsement stating that such ownership interest is limited by, and subject to, the terms and provisions of this Agreement.

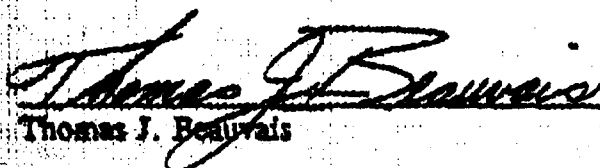
12. Counterparts. This Agreement may be executed in one or more counterparts, each of which constitute an original instrument.

IN WITNESS WHEREOF, the Parties have entered into this Agreement on the date of first set forth above.

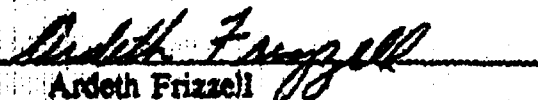
"ASF"

  
Ardeth S. Frizzell

"TJB"

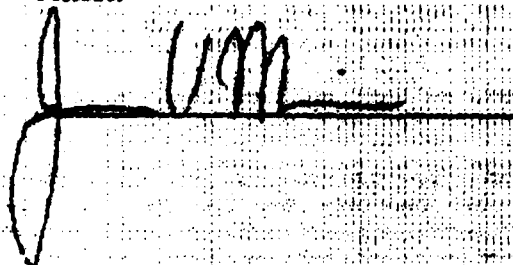
  
Thomas J. Beauvais

Approved for ASF Broadcasting Corporation  
an Ohio Corporation ("Company")

By:   
Ardeth Frizzell

Title: President

Attest:



**ATTACHMENT 2**

# DECLARATION

I, Carl B. Fry, hereby state under penalty of perjury as follows:

1. I am the Authorized Representative for Mid-Ohio Communications, Inc. ("Mid-Ohio").

2. In December 1991, I issued letters on behalf of Mid-Ohio to various applicants for Mid-Ohio's former Westerville facility in regard to the lease of the tower site (tower and building) located at State Route 37, Sunbury, Ohio 43074 and studio facilities located at 14 Dorchester Court, Westerville, Ohio 43081 providing assurances that Mid-Ohio is willing to negotiate appropriate leases for the aforementioned real property.

3. I further indicated in my above-referenced correspondence that Mid-Ohio is willing to negotiate appropriate leases for certain personal property.

4. In regard to the personal property, Mid-Ohio provided no assurance concerning what itemized equipment in the inventory accompanying the correspondence would be available to the successful applicant. Although I indicated that the equipment would include some or perhaps all of the equipment itemized in the inventory, I made it clear that the failure to lease all the equipment listed in the inventory will not result in a reduced lease package price. At this time, I am not certain as to whether any of the equipment has been sold or otherwise disposed of. To the best of my knowledge, there are no plans to liquidate the equipment at this time.

5. Regardless of what equipment is available, the lease package price would not be reduced from six thousand dollars (\$6000.00) per month.

6. Although it is contemplated that mutually acceptable terms will be negotiated in regard to the various leases comprising the lease package, there is no guarantee of that occurrence.

MID-OHIO COMMUNICATIONS, INC.

DATED: 9/15/92

BY: Carl B. Fry  
CARL B. FRY, Authorized Agent

**ATTACHMENT 3**

PLC

## Priority Leasing Corporation

4210 Spicewood Springs Road • Suite 203 • Austin, Texas 78759  
512 • 345-5298 800 • 999-9546 FAX 512 • 345-8650

DATE: September 15, 1993

TO: Dan Alpert

VIA FAX

FROM: Cathie Hayden, ext 135

SUBJ: Blank Lease

Mr. Alpert:

The following lease copies illustrate a "standard" lease that would be used for an equipment lease. We have placed an 'X' where individual information would be shown. The lease document, along with the Schedule A (itemized with specific equipment) is industry standard and accepted by most underwriters.

I hope this is of assistance to you. Please call me if you have any other questions.



LESSOR

FULL LEGAL NAME AND ADDRESS OF LESSEE

SUPPLIER OF EQUIPMENT (COMPLETE ADDRESS)

JOINTLY AND SEVERALLY RESPONSIBLE

EQUIPMENT  
LOCATION  
DIFFERENTEQUIPMENT  
LOCATION  
DIFFERENT

STREET ADDRESS

CITY

COUNTY

STATE

ZIP

TERMS

AMOUNT OF EACH PAYMENT  
(PLUS SALES TAX, IF APPLICABLE)MONTHLY  
OTHER/SPECIFYTERM OF LEASE  
(NO. OF MONTHS)

NO. OF PAYMENTS

SECURITY  
DEPOSIT

## TERMS AND CONDITIONS OF LEASE

1. **LEASE.** Lessee hereby leases from Lessor, and Lessor leases to Lessee, the personal property described above, together with any replacement parts, additions, repairs or accessories now or hereafter incorporated in or affixed to it (hereinafter referred to as the "Equipment").

2. **ACCEPTANCE OF EQUIPMENT.** Lessee agrees to inspect the Equipment and to execute an Acknowledgement and Acceptance of Equipment by Lessee notice, as provided by Lessor, after the Equipment has been delivered and after Lessee is satisfied that the Equipment is satisfactory in every respect. Lessee hereby authorizes Lessor to insert in this Lease serial numbers or other identifying data with respect to the Equipment.

3. **DISCLAIMER OF WARRANTIES AND CLAIMS; LIMITATION OF REMEDIES.** THERE ARE NO WARRANTIES BY OR ON BEHALF OF LESSOR. Lessee acknowledges and agrees by his signature below as follows:

- (a) LESSOR MAKES NO WARRANTIES EITHER EXPRESS OR IMPLIED AS TO THE CONDITION OF THE EQUIPMENT, ITS MERCHANTABILITY, ITS FITNESS OR SUITABILITY FOR ANY PARTICULAR PURPOSE, ITS DESIGN, ITS CAPACITY, ITS QUALITY, OR WITH RESPECT TO ANY CHARACTERISTICS OF THE EQUIPMENT;
- (b) Lessee has fully inspected the Equipment which it has requested Lessor to acquire and lease to Lessee, and the Equipment is in good condition and to Lessee's complete satisfaction;
- (c) Lessee leases the Equipment "as is" and with all faults;
- (d) Lessee specifically acknowledges that the Equipment is leased to Lessee solely for commercial or business purposes and not for personal, family, household, or agricultural purposes;
- (e) If the Equipment is not properly installed, does not operate as represented or warranted by the supplier or manufacturer, or is unsatisfactory for any reason, regardless of cause or consequence, Lessee's only remedy, if any, shall be against the supplier or manufacturer of the Equipment and not against Lessor;
- (f) Provided Lessee is not in default under this Lease, Lessor assigns to Lessee any warranties made by the supplier or the manufacturer of the Equipment;
- (g) LESSEE SHALL HAVE NO REMEDY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES AGAINST LESSOR; and
- (h) NO DEFECT, DAMAGE, OR UNFITNESS OF THE EQUIPMENT FOR ANY PURPOSE SHALL RELIEVE LESSEE OF THE OBLIGATION TO PAY RENT OR RELIEVE LESSEE OF ANY OTHER OBLIGATION UNDER THIS LEASE.

INITIALS

The parties have specifically negotiated and agreed to the foregoing paragraph.

4. **STATUTORY FINANCE LEASE.** Lessee agrees and acknowledges that it is the intent of both parties to this Lease that it qualify as a statutory finance lease under Article 2A of the Uniform Commercial Code. Lessee acknowledges and agrees that Lessee has selected both: (1) the Equipment; and (2) the supplier from whom Lessor is to purchase the Equipment. Lessee acknowledges that Lessor has not participated in any way in Lessee's selection of the Equipment or of the supplier, and Lessor has not selected, manufactured, or supplied the Equipment.

LESSEE IS ADVISED THAT IT MAY HAVE RIGHTS UNDER THE CONTRACT EVIDENCING THE LESSOR'S PURCHASE OF THE EQUIPMENT FROM THE SUPPLIER CHOSEN BY LESSEE AND THAT LESSEE SHOULD CONTACT THE SUPPLIER OF THE EQUIPMENT FOR A DESCRIPTION OF ANY SUCH RIGHTS.

5. **ASSIGNMENT BY LESSEE PROHIBITED.** WITHOUT LESSOR'S PRIOR WRITTEN CONSENT, LESSEE SHALL NOT ASSIGN THIS LEASE OR SUBLEASE THE EQUIPMENT OR ANY INTEREST THEREIN, OR PLEDGE OR TRANSFER THIS LEASE, OR OTHERWISE DISPOSE OF THE EQUIPMENT COVERED HEREBY.

6. **RENTAL PAYMENTS.** Lessee agrees to pay the total rent equal to the "Amount of Each Payment" multiplied by the number of payments specified in "No. of Payments." Payments will be made in advance and periodically as specified in "Terms" above. Payments shall be made by Lessee at Lessor's address set forth above, or as otherwise directed by Lessor. Lessee shall not abate, set off, deduct any amount, or reduce any payment for any reason. The first payment shall be due on the date of acceptance of the Equipment by Lessee, and subsequent payments shall be due on the same day of each succeeding month throughout the term of the Lease.

(a) THIS LEASE IS NOT CANCELABLE OR TERMINABLE BY LESSEE.

(b) SEE REVERSE SIDE FOR ADDITIONAL TERMS AND CONDITIONS WHICH ARE A PART OF THIS LEASE.

(c) LESSEE UNDERSTANDS AND ACKNOWLEDGES THAT NO BROKER OR SUPPLIER, NOR ANY SALESMAN, BROKER, OR AGENT OF ANY BROKER OR SUPPLIER, IS AN AGENT OF LESSOR. NO BROKER OR SUPPLIER, NOR ANY SALESMAN, BROKER, OR AGENT OF ANY BROKER OR SUPPLIER, IS AUTHORIZED TO WAIVE OR ALTER ANY TERM OR CONDITION OF THIS LEASE, AND NO REPRESENTATION AS TO THE EQUIPMENT OR ANY OTHER MATTER BY THE BROKER OR SUPPLIER, NOR ANY SALESMAN, BROKER, OR AGENT OF ANY BROKER OR SUPPLIER, SHALL IN ANY WAY AFFECT LESSEE'S DUTY TO PAY THE RENTALS AND TO PERFORM LESSEE'S OBLIGATIONS SET FORTH IN THIS LEASE.

7. **CHOICE OF LAW.** This Lease shall not be effective until signed by Lessor at its principal office listed above. This Lease shall be considered to have been made in the state of Lessor's principal place of business listed above and shall be interpreted in accordance with the laws and regulations of the state of Lessor's principal place of business.

Lessee agrees to jurisdiction in the state of Lessor's principal place of business listed above in any action, suit or proceeding regarding this Lease, and concedes that it, and each of them, transacted business in the state of Lessor's principal place of business listed above by entering into this Lease. In the event of any legal action with regard to this lease or the equipment covered hereby, Lessee agrees that venue may be laid in the County of Lessor's principal place of business.

LESSEE:

LESSOR:

DATE

DATE

DATE

LESSOR: X

LEASE NO: \_\_\_\_\_

DATE OF LEASE: \_\_\_\_\_

This Guaranty Agreement made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_

(hereinafter referred to collectively as "Guarantor"), in favor of X (hereinafter referred to as "Lessor").

X WHEREAS, it is contemplated that Lessor may enter into a lease and/or other related agreements (hereinafter collectively "Lease") with \_\_\_\_\_ (hereinafter collectively "Lessee"); and,

WHEREAS, Guarantor has an interest, financial or otherwise, in Lessee, and it is to the benefit of Guarantor that Lessor enter into the Lease with Lessee, and Guarantor has read the proposed Lease in full and finds the terms of said Lease acceptable, and in recognition that Lessor would be unwilling to enter into the Lease without the Guaranty hereinafter set forth, and in recognition of Lessor's reliance upon the Guaranty in entering into the Lease;

NOW, THEREFORE, in order to induce Lessor to enter into the Lease, Guarantor, jointly and severally, unconditionally guarantees the faithful and full performance by Lessee of all terms and conditions of the Lease. In the event of default by Lessee, or failure to faithfully perform any of the terms or conditions required of Lessee under the Lease, or in the event of failure of Lessee to make any or all payments of money required of it under the Lease, Guarantor unconditionally promises to pay to Lessor, in lawful money of the United States, all sums at any time due and unpaid under the Lease, plus costs of collection, including reasonable attorney fees with or without trial, and upon appeal and review.

The obligations of Guarantor hereunder are joint and several and are independent of the obligations of Lessee under the Lease, and a separate action or actions may be brought against Guarantor, whether action is brought against Lessee or whether Lessee be joined in any action or actions, the liability of Guarantor hereunder being primary. Guarantor hereby waives the benefit of any suretyship defenses affecting its liability hereunder or the enforcement hereof.

Guarantor authorizes Lessor, without notice or demand, and without affecting Guarantor's liability hereunder, from time to time to renew, extend, accelerate, or otherwise change the payment terms or other terms of the Lease or any part thereof. Lessor may, without notice, assign this Guaranty in whole or in part.

Guarantor hereby waives any right to require Lessor to: (a) proceed against Lessee; (b) proceed against or exhaust any security held by Lessor; or (c) pursue any other remedy in Lessor's power. Guarantor waives any defense arising by reason of any defense of Lessee, or by reason of the cessation, from any cause whatsoever, of the liability of Lessee under the Lease. Guarantor waives any and all demands for performance, notices of nonperformance or default, and notices of cancellation or forfeiture. Lessor may apply all proceeds received from Lessee or others to such part of Lessee's indebtedness as Lessor may deem appropriate without consulting Guarantor and without prejudice to or in any way limiting or lessening the liability of Guarantor under this Guaranty.

If Lessee is a corporation, the undersigned warrant and represent that they are stockholders, directors or officers and/or are financially or otherwise interested in Lessee, and, if married, their marital communities are so interested.

This Guaranty shall not be affected or discharged by the death of the undersigned, but shall bind Guarantor's heirs and personal representatives, and shall inure to the benefit of any successors or assigns of Lessor.

This instrument constitutes the entire agreement between Lessor and Guarantor. No oral or written representation not contained herein shall in any way affect this Guaranty, which shall not be modified except by the parties in writing. Waiver by Lessor of any provision hereof in one instance shall not constitute a waiver as to any other instance.

**IMPORTANT: THIS AGREEMENT CREATES SPECIFIC LEGAL OBLIGATIONS. DO NOT SIGN IT UNTIL YOU HAVE FULLY READ IT. BY SIGNING YOU COMPLETELY AGREE TO ITS TERMS.**

IN WITNESS WHEREOF, the undersigned Guarantor(s) has/have executed this Guaranty this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_

GUARANTOR: X

GUARANTOR:

NAME \_\_\_\_\_

NAME \_\_\_\_\_

Home Address \_\_\_\_\_

Home Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

WITNESS \_\_\_\_\_

WITNESS \_\_\_\_\_



LESSOR: **X**

LEASE NUMBER \_\_\_\_\_

DATE OF LEASE \_\_\_\_\_

LESSEE: **X**

## ACKNOWLEDGEMENT AND ACCEPTANCE OF EQUIPMENT BY LESSEE

Lessee hereby acknowledges that the Equipment described above has been received in good condition and repair, has been properly installed, tested, and inspected, and is operating satisfactorily in all respects for all of Lessee's intended uses and purposes. Lessee hereby accepts unconditionally and irrevocably the Equipment.

By signature below, Lessee specifically authorizes and requests Lessor to make payment to the supplier of the Equipment. Lessee agrees that said Equipment has not been delivered, installed, or accepted on a trial basis.

WITH THE DELIVERY OF THIS DOCUMENT TO LESSOR, LESSEE ACKNOWLEDGES AND AGREES THAT LESSEE'S OBLIGATIONS TO LESSOR BECOME ABSOLUTE AND IRREVOCABLE AND LESSEE SHALL BE FOREVER ESTOPPED FROM DENYING THE TRUTHFULNESS OF THE REPRESENTATIONS MADE IN THIS DOCUMENT.

DATE OF ACCEPTANCE:

LESSEE:

\_\_\_\_\_  
  
**IMPORTANT: THIS DOCUMENT HAS  
LEGAL AND FINANCIAL CONSEQUENCES  
TO YOU. DO NOT SIGN THIS DOCUMENT  
UNTIL YOU HAVE ACTUALLY RECEIVED  
ALL OF THE EQUIPMENT AND ARE  
COMPLETELY SATISFIED WITH IT.**

\_\_\_\_\_  
  
I HEREBY AUTHORIZE \_\_\_\_\_, \_\_\_\_\_  
TO ORALLY VERIFY MY/OUR ACCEPTANCE OF THE TITLE  
ABOVE REFERENCED EQUIPMENT IN MY ABSENCE.